

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35444

FRANK LESLIE NICOLAI, III,)	2010 Unpublished Opinion No. 382
)	
Petitioner-Appellant,)	Filed: March 16, 2010
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Michael E. Wetherell, District Judge.

Order of the district court dismissing, in part, application for post-conviction relief, affirmed.

Paul E. Riggins, Boise, for appellant. Paul E. Riggins argued.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent. Jessica M. Lorello argued.

PERRY, Judge Pro Tem

Frank L. Nicolai, III, appeals from the district court's order dismissing, in part, his application for post-conviction relief following an evidentiary hearing. We affirm.

I.

FACTS AND PROCEDURAL BACKGROUND

Nicolai was arrested and subsequently indicted on charges of rape, I.C. § 18-6101, and kidnapping, I.C. § 18-4503. During trial, Nicolai chose to change his plea and ultimately pled guilty to both counts. The district court sentenced Nicolai to a determinate twenty-five-year term for kidnapping and a concurrent fixed life sentence for rape. Nicolai filed an Idaho Criminal Rule 35 motion for reduction of sentence, which was denied. Nicolai did not file a direct appeal.

Nicolai filed an application for post-conviction relief alleging a number of claims. The State filed an answer and moved for summary dismissal of all of Nicolai's claims. The district court issued a notice of its intention to dismiss all but Nicolai's claim of ineffective assistance of

counsel. Nicolai filed an amended application for post-conviction relief and later a second amended application asserting only allegations of ineffective assistance of counsel. The State filed an answer and again moved for summary dismissal. The district court denied the State's motion and scheduled an evidentiary hearing.

The district court ultimately denied Nicolai's application for post-conviction relief, "except for his assertion that he received ineffective assistance of counsel in relation to the psychosexual evaluation." With respect to that claim, the court re-sentenced Nicolai to the same terms it had originally imposed. This Court affirmed Nicolai's judgment of conviction and sentences in an unpublished opinion. *State v. Nicolai*, Docket No. 35770 (Ct. App. May 5, 2009) (unpublished). With respect to the district court's denial of Nicolai's remaining claims, he now appeals.¹

II. ANALYSIS

In order to prevail in a post-conviction proceeding, the applicant must prove the allegations by a preponderance of the evidence. I.C. § 19-4907; *Stuart v. State*, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990). When reviewing a decision denying post-conviction relief after an evidentiary hearing, an appellate court will not disturb the lower court's factual findings unless they are clearly erroneous. I.R.C.P. 52(a); *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. *Larkin v. State*, 115 Idaho 72, 73, 764 P.2d 439, 440 (Ct. App. 1988). We exercise free review of the district court's application of the relevant law to the facts. *Nellsch v. State*, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992).

Preliminarily, we note that Nicolai does not appear to have fully appreciated his burden at the evidentiary hearing. He may have established genuine issues of material fact such that he could survive a motion for summary dismissal, but the district court recognized as much and held an evidentiary hearing. His burden at the evidentiary hearing was to prove his allegations by a preponderance of the evidence. However, Nicolai did not provide any more evidence than he

¹ The State, in its brief, argued that Nicolai failed to file a timely notice of appeal. The State withdrew this contention at oral argument, however, and we do not address it.

had already presented to demonstrate a genuine issue of material fact. Nicolai's testimony at the evidentiary hearing simply reiterated the claims he raised in his initial and amended applications for post-conviction relief. He did not present any witnesses, affidavits, or evidence other than his own testimony. The only witness, other than Nicolai, to testify at the evidentiary hearing was his trial counsel, who was called by the State. His testimony generally contradicted Nicolai's claims. The post-conviction court "found [trial counsel's] testimony to be the more credible of the two." Although it is possible for an applicant's testimony alone to prove his or her allegations by a preponderance of the evidence, the district court, in denying in part Nicolai's application, determined that Nicolai's testimony was insufficient to meet his burden of proof.

A. Ineffective Assistance

Nicolai asserted approximately twenty-two allegations of ineffective assistance of counsel in his second amended application for post-conviction relief. At the evidentiary hearing, Nicolai moved to dismiss three of those allegations. Nicolai presents twelve allegations of ineffective assistance of counsel on appeal.

A claim of ineffective assistance of counsel may properly be brought under the Uniform Post-Conviction Procedure Act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). Where, as here, the defendant was convicted upon a guilty plea, to satisfy the prejudice element, the claimant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial. *Plant v. State*, 143 Idaho 758, 762, 152 P.3d 629, 633 (Ct. App. 2006). This Court has long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

As an initial matter, Nicolai contends, citing *Matthews v. State*, 122 Idaho 801, 839 P.2d 1215 (1992), that it was error for the district court to rely upon its own recollections in denying part of Nicolai's claims. Nicolai argues that the court impermissibly relied upon its own recollection in ruling on the issues regarding allegations of failure to pursue a motion to suppress, failure to properly advise with respect to Nicolai's prior convictions, failure to pay attention during trial, and failure to file a motion to dismiss due to a speedy trial violation. Even assuming that the court inappropriately referenced its own recollections in certain instances, the court had alternative bases for its holdings. This alternative reasoning on each issue is sufficient to affirm the district court. Accordingly, Nicolai has failed to show error in this regard. Nicolai also argues that the court referred to events that occurred at trial even though a trial transcript was not before the court. We note, however, that resolution of several of Nicolai's claims required review of pre-hearing, trial, and sentencing transcripts. As this Court stated in *Roman v. State*, 125 Idaho 644, 648, 873 P.2d 898, 902 (Ct. App. 1994):

A post-conviction proceeding is not an extension of the criminal case from which it arises. Rather, it is a separate civil action in which the applicant bears the burden of proof imposed upon a civil plaintiff. *Paradis v. State*, 110 Idaho 534, 536, 716 P.2d 1306, 1308 (1986); *Clark v. State*, *supra*. No part of the record from the criminal case becomes part of the record in the post-conviction proceeding unless it is entered as a[n] exhibit. Transcripts of the pretrial proceedings, the trial, and sentencing hearing in the criminal case, even if previously prepared as a result of a direct appeal or otherwise, are not before the trial court in the post-conviction proceeding and do not become part of the record on appeal unless presented as exhibits. Further, our Supreme Court has held that a district court, in ruling on ineffective assistance of counsel issues raised in a post-conviction application, may not take "judicial notice" of the attorney's performance at the criminal trial, but, instead, must review the trial transcript. *Matthews v. State*, 122 Idaho 801, 807-08, 839 P.2d 1215, 1221-22 (1992).

Other than the change of plea hearing transcript and the sentencing transcript, this Court has not been provided with any other exhibits that were offered to the district court. The parties did request that the district court take judicial notice of the "underlying criminal case." This does not, however, equate to presenting transcripts as exhibits such that they are before the post-conviction court for review and ultimately become part of the record on appeal. While I.C. § 19-4906 imposes upon the State the responsibility to pay for the preparation of such transcripts, the statute does not relieve the applicant of the consequence of failing to place in evidence a transcript essential to prove the applicant's claim. *Roman*, 125 Idaho at 648, 873 P.2d at 902.

1. Advice to plead guilty

Nicolai claims that his trial counsel was ineffective in advising him regarding his change of plea. Specifically, Nicolai asserts that his trial counsel “assured” him that he would get out of prison in his mid-fifties, approximately a ten-year sentence, which Nicolai relied upon in pleading guilty. The district court concluded:

[A] review of the Change of Plea Hearing Transcript reveals that the petitioner stated the following under oath: that it was his decision to plead guilty; that he was doing so because he was guilty of the charges; that no promises had been made as to sentencing; that the reason why he decided to plead guilty was because of the “overwhelming evidence;” that he was pleading guilty freely and voluntarily; that he was satisfied with the services of his attorney; and that his attorney had satisfactorily advised him of his rights, defenses and the possible consequences of pleading guilty. In short, the petitioner’s sworn statements during the guilty plea proceeding contradict his assertions that he was improperly “encouraged” into pleading guilty.

The court found that Nicolai’s trial counsel made no specific promises regarding the outcome of Nicolai’s decision to plead guilty and concluded that counsel’s testimony was more credible. Nicolai does not challenge the court’s credibility determinations on appeal, and the court’s conclusions are supported by the record.

Nicolai argues that this alleged error by trial counsel, as well as the other alleged errors by trial counsel raised on appeal, all contributed to his pleading guilty. These contentions are belied by the record. As noted, Nicolai testified at the change of plea hearing that he was satisfied with the services of his attorney and that he was pleading guilty due to “overwhelming evidence.” As noted by the district court, his assertions in his application as well as his testimony at the evidentiary hearing are directly contrary to his testimony at the change of plea hearing. Nicolai has failed to show that the district court erred in concluding that he did not meet his burden of proof on this issue.

2. Advice regarding prior convictions

Nicolai contends that his trial counsel was ineffective in advising him that his prior convictions “would in fact be used against him if he were to testify at his trial.” As stated in his application, Nicolai asserted “[t]hat Counsel informed Petitioner that the State of Idaho *might* introduce his prior criminal record for impeachment if Petitioner were to testify” and that because his convictions occurred more than ten years prior to the trial, counsel was ineffective for failing to file a motion to exclude the introduction of this evidence. (Emphasis added.) It is

not ineffective assistance of counsel to notify a client that prior convictions might be used for impeachment should the defendant choose to testify. Here, the State, pursuant to Idaho Rule of Evidence 609(b), provided notice of its intent to use, as evidence of impeachment, Nicolai's prior convictions of theft should Nicolai choose to testify. The district court, considering Nicolai's claim, stated:

Theft related convictions are obviously relevant to the veracity of a witness. Of course, these theft related convictions were more than ten years old, so the court may not necessarily have let them in, but the petitioner is incorrect in asserting that their admission would have automatically been prohibited pursuant to I.R.E. 609. The court doubts that fear of impeachment by these convictions were the reason why the petitioner chose to plead guilty and not testify at his trial. Instead, [trial counsel's] reasoning is more credible. [Trial counsel] asserted that the petitioner chose to plead guilty because he knew he was going to be convicted and he was trying to "cut his losses."

Nicolai has failed to demonstrate deficient performance let alone prejudice from prior convictions that were never used against him. He has not demonstrated that the district court's findings regarding why he chose to plead guilty are clearly erroneous. Thus, he has failed to show that the district court erred in its determination that he did not meet his burden of proof.

3. Communication, investigation, and preparation

Nicolai claims that his trial counsel was ineffective because he "failed to spend enough time with him, have enough contact with him, and pay enough attention to the case"; he "failed to adequately prepare witnesses and be prepared to present their testimony at his trial"; and he "failed to investigate, obtain, and be ready to present at trial certain potentially exculpatory evidentiary materials; namely, telephone records from the alleged victim's phone." Nicolai asserts that these failures led to Nicolai's decision to plead guilty because he was convinced that his counsel was refusing to present a defense.

As to each of these claims, the district court found that Nicolai had failed to show that, absent these alleged errors, there was a reasonable probability of a different outcome. The court determined that Nicolai failed to demonstrate a reasonable probability that, had trial counsel spent more time with him, interviewed witnesses, and obtained phone records, the outcome would have been different. Nicolai has not demonstrated that the court's conclusions were in error.

Nicolai fails to establish how the amount of time counsel spent with him equated to deficient performance let alone how spending more time would have resulted in a different outcome. *See State v. Osborne*, 130 Idaho 365, 372, 941 P.2d 337, 344 (Ct. App. 1997) (allegations that counsel failed to meet with the defendant an appropriate number of times, without evidence of some specific error or misstep by counsel, do not establish ineffective assistance of counsel in light of the fact that there is no minimum number of times an attorney must meet with a client prior to trial in order to be adequately prepared). Moreover, Nicolai did not provide any sworn affidavits or witness testimony at the evidentiary hearing to meet his burden of demonstrating how the outcome would have been different. *See Hall v. State*, 126 Idaho 449, 453, 885 P.2d 1165, 1169 (Ct. App. 1994) (it is not enough to allege that a witness would have testified to certain events, or would have rebutted certain statements made at trial, without providing through affidavit, nonhearsay evidence of the substance of the witnesses' testimony). Finally, Nicolai did not present any phone records to substantiate his allegations such that he could demonstrate that the outcome would have been different. Again, he has failed to show that the district court's findings and conclusions were in error in light of the fact that he did not meet his burden of proof once provided an evidentiary hearing to do so.

4. Attention during trial

Nicolai asserted in his application that his trial counsel was "reading a yoga magazine," which "limit[ed] his ability to make timely objections or otherwise rigorously cross-examine witnesses." At the evidentiary hearing, Nicolai testified that because his trial counsel was looking at the magazine while in view of the jury and during the presentation of the State's video evidence, he did not see "any reason to continue with the trial." With respect to the claim as set forth in his application, Nicolai does not identify any objections that should have been made or witnesses that could have been rigorously cross-examined while the State was presenting its video evidence. With respect to the claim as set forth at the evidentiary hearing, the district court concluded that Nicolai failed to demonstrate that if trial counsel had not been reading the magazine there was a reasonable probability that the outcome of the proceeding would have been different or that he would have insisted on continuing with his trial, given the overwhelming evidence against him. Moreover, Nicolai's contention at the evidentiary hearing is directly contrary to his testimony at the change of plea hearing that he pled guilty because of "overwhelming evidence." Nicolai has failed to demonstrate that the district court erred.

5. Failure to file motions

Nicolai also contends that trial counsel was ineffective for failing to pursue a viable motion to suppress, for failing to move to strike the jury after the jury allegedly observed Nicolai in shackles, and for failing to file a motion to dismiss due to a speedy trial violation. In a post-conviction proceeding challenging an attorney's failure to pursue a motion in the underlying criminal action, the district court may consider the probability of success of the motion in question in determining whether the attorney's inactivity constituted incompetent performance. *Boman v. State*, 129 Idaho 520, 526, 927 P.2d 910, 916 (Ct. App. 1996). Where the alleged deficiency is counsel's failure to file a motion, a conclusion that the motion, if pursued, would not have been granted by the trial court, is generally determinative of both prongs of the *Strickland* test. *Id.* The district court determined that Nicolai failed to show that any of these motions would have been successful. We agree.

a. Failure to pursue motion to suppress

Nicolai contends that his trial counsel was ineffective for failing to pursue a valid motion to suppress. Nicolai asserted in his application that he requested an attorney during his interrogation prior to making inculpatory statements and that had his statements been suppressed, it "would have altered the course of trial." Nicolai testified similarly at the evidentiary hearing. Nicolai also testified that counsel's failure to pursue a motion to suppress was "one of the reasons why [he] chose to plead guilty."

Counsel did in fact file a motion to suppress "any and all statements made by [Nicolai] to authorities while in custody" as being in violation of Nicolai's Fifth and Sixth Amendment rights under the United States Constitution as well as Article I, section 13, of the Idaho Constitution. A hearing was set, but Nicolai's counsel ultimately withdrew the motion "upon the grounds and for the reason that upon further review of the case, there is no reasonable basis to pursue such a motion." Nicolai testified at the evidentiary hearing that he did not ask counsel to withdraw the motion. The post-conviction court found that Nicolai's trial counsel did not perceive any meritorious suppression issues and that Nicolai had failed to advance any suppression issues that had a reasonable probability of altering the outcome of the proceeding. Indeed, Nicolai did not present any evidence at the evidentiary hearing, i.e., the interrogation tape, in order for the court to review the viability of his claim. Nicolai has not shown the district court's ruling to be in

error. Thus, he has failed to demonstrate that the withdrawn motion to suppress would have been granted had it been pursued.

b. Failure to object to jury or move to strike

Nicolai contends that trial counsel was ineffective when he failed to object to the jury pool or move to strike the jury after being informed that the jury pool had observed Nicolai “in a potentially prejudicial fashion,” i.e., in shackles and handcuffs. The district court determined that Nicolai had failed to demonstrate that there was a reasonable probability that the court would have granted any motion with respect to the jury pool, concluding that Nicolai had not presented any evidence that a juror did in fact see him dressed in jail garb or that he had suffered prejudice as a result. The court noted that this was particularly so “where, as here, the petitioner pled guilty before the case even went to the jury.”

Nicolai asserts that he “was never arguing that this mistake by his trial counsel led to a verdict from a biased jury,” rather that “he was arguing that this was another example of a line of omissions and errors by his trial counsel which convinced Nicolai that his trial counsel was not defending him and therefore he had no hope and no reason to carry on with trial.” However, he presented his claim in his application as a “fail[ure] to object to the jury pool or otherwise request a new jury pool that was not tainted by observing Petitioner in chains and depriving Petitioner of a fair and impartial panel of jurors.” Based upon this allegation, the district court correctly concluded that Nicolai failed to present any evidence that a juror selected for his panel actually saw him in restraints and, therefore, that he failed to demonstrate any prejudice. With regard to Nicolai’s current allegation that he pled guilty because counsel failed to move to strike the jury, this claim, as his other claims, is directly contrary to his testimony that he pled guilty because of overwhelming evidence and that he was satisfied with his attorney’s representation. Nicolai has failed to establish that any motion to strike the jury pool would have been granted.

c. Failure to file motion to dismiss on grounds of speedy trial violation

Nicolai claims that he was deprived of his statutory and constitutional rights to a speedy trial and that his trial counsel was ineffective for failing to pursue a motion to dismiss based upon this violation. The district court determined that good cause likely existed to delay the trial where Nicolai had contributed to the delay, where the State was expecting lab work, and where no prejudice to the defense had been asserted. The court also noted that the State would likely have been permitted to re-file the charges in the event a dismissal had been granted.

Nicolai contends that no “showing” of good cause ever took place and that the district court never ruled on the issue. The court minutes indicate that a hearing was held. However, they are unclear as to whether the court ruled on the issue of good cause. The transcript of the hearing is not included as an exhibit on appeal. It was Nicolai’s burden to provide evidence to substantiate his claim. *See Roman*, 125 Idaho at 648, 873 P.2d at 902. Accordingly, Nicolai has failed to show that the district court erred in concluding that a motion to dismiss would have been unsuccessful.

6. Failure to file appeal

Nicolai claims that trial counsel was ineffective for failing to file a direct appeal, despite his request for counsel to do so. Rather than directly analyze this claim, the court concluded:

The petitioner has no proof of this, other than his own self-serving assertion. The court does not find this to be a credible assertion. No credible reason has been advanced as to why [trial counsel], at the time an experienced and competent public defender who had filed countless appeals on behalf of his clients, would have failed to file a notice of appeal for the petitioner, had it been requested. The petitioner claimed during the hearing that he wrote letters to [trial counsel] asking him about his appeal and that he has copies of these, but they have not been presented to the court. This further undermines the petitioner’s credibility.

Nicolai does not challenge this credibility determination on appeal. The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. *Larkin*, 115 Idaho at 73, 764 P.2d at 440. Thus, Nicolai has failed to demonstrate that the district court erred in concluding that he did not meet his burden of proof.

B. Constitutional Claims

Nicolai asserts that his constitutional rights to due process and presentation of a defense were violated during the course of the evidentiary hearing. Specifically, he asserts that “[t]he District Court repeatedly shut down Nicolai’s counsel during the Evidentiary Hearings, and prevented him from inquiring into a number of various important issues” and “deprived him of a fair and meaningful opportunity to ‘defend himself’” by “improperly limit[ing] Nicolai’s presentation of testimony.” These claims are meritless.

With regard to Nicolai’s claim that the court limited his ability to testify and present a defense, this allegation is belied by the record. The court was extremely patient with the direct examination of Nicolai and, upon several objections by the prosecutor, repeatedly attempted to

assist Nicolai's post-conviction counsel in focusing on how his trial counsel's alleged deficiencies led him to plead guilty.

Nicolai also claims that because the court limited his ability to be heard in a meaningful way, his due process rights were violated. However, Nicolai was afforded an evidentiary hearing in which the court assisted, rather than hindered, his ability to be heard in a meaningful manner. The court was not required to disregard the rules of evidence and allow any and all testimony. Nicolai contends that the district court "failed to grant him a full and fair hearing after he raised genuine issues of material fact concerning the ineffective assistance provided to him by his court-ordered counsel." Nicolai does not directly challenge, however, the basis for any of the court's evidentiary rulings. He has not argued that any of the prosecutor's objections were improperly sustained. It was Nicolai's obligation to prove his allegations by a preponderance of the evidence at the evidentiary hearing. Nicolai's own inability to present admissible evidence does not equate to error on the part of the post-conviction court.²

III.

CONCLUSION

Nicolai failed to meet his burden of proving his allegations by a preponderance of the evidence. Therefore, the district court's order dismissing, in part, his application for post-conviction relief is affirmed.

Chief Judge LANSING and Judge GUTIERREZ, **CONCUR.**

² Nicolai also argues that trial counsel was ineffective for failing to properly advise and assist him during the pre-sentence investigation process prior to sentencing and for failing to adequately address his mental health issues at sentencing. However, these claims are now moot due to the fact that Nicolai received post-conviction relief on his *Estrada* claim and has already been re-sentenced. We cannot grant Nicolai any greater relief than he has already received. Nicolai also asserts that he is entitled to relief under the cumulative error doctrine. However, because we have found no error, the doctrine does not apply.